IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 971 OF 2005
ALONG WITH
CIVIL APPLICATION NO. 1139 OF 2005

Riyasat Ali S/o Chhotak Ali since
deceased through his heirs
and legal representatives:
1. Mrs. Riyasatali @ Mullain
and Ors. ...Appellants.

v/s

Mrs. Mobarakunnissa S/o Abdul
Jabbar ...Respondent.

Mr. P.K. Jadhav for the appellants.
Mr. V.R. Tripathi i/b V.R. Tripathi & Associates for
the respondent.

CORAM: V.M.KANADE,J.
DATE: 28th October, 2005

P.C.]

1. Heard the learned counsel appearing on behalf of the appellants and the learned counsel appearing on behalf of the respondent.

2. The appellants are challenging the order passed by the trial court, rejecting their application for condonation of delay in filing the notice of motion for setting aside the judgment and decree passed by the trial court in the suit instituted by the respondent/plaintiff. It is an admitted position that there is a delay of almost 8 months in taking out

notice of motion for setting aside the ex parte decree which was passed on merits by the trial court. It is the case of the appellants that they came to know that the ex parte decree has been passed only after notice was issued by the executing court under Order 21 Rule 35. It is submitted that the case of the appellants was looked after by their elder brother of the appellants/defendants and, therefore, they were not aware about day-to-day proceedings and only after the notice was issued by the executing court, they came to know about the ex parte decree which was passed by the trial court.

3. I have perused the judgment and order passed by the trial court which is decided on merits. I have also perused the order issued by the executing court under Order 21 Rule 35 of the Civil Procedure Code. I have perused the roznama of the trial court which, in clear terms, states that the defendants have remained absent on number of dates and, therefore, the trial court was constrained to proceed with the matter ex parte. The evidence on record indicates that the defendants had accepted various amounts from the plaintiff and since 1988 had failed to perform their part of the obligation under the agreement of sale. In my view, there is no sufficient cause made out for

condonation of delay and this is clearly an attempt to delay the execution proceedings. Defendants are developers and they have constructed two buildings. When a suggestion was made by this court as to whether the defendants were willing to hand over one flat which is described in the plaint to the Court Receiver, this suggestion was declined by the defendants on the ground that the suit flat had already been sold to some third party. The conduct of the defendants, therefore, also does not appear to be bonafide. Under the circumstances, there is no reason to interfere with the order passed by the trial court. Appeal from order is, therefore, dismissed. In view of the dismissal of the Appeal from order, Civil Application No. 1139 of 2005 taken out therein does not survive and the same is disposed of accordingly.

V.M. KANADE, J.